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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

SUMMARY RECORD OF THE 6th PLENARY MEETING

Held at the Austria Center Vienna,
on Tuesday, 16 April 1991, at 9.30 a.m.

President: Mr. ABASCAL (Mexico)

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The meeting was called to order at 10 a.m.

CONSIDERATION OF THE QUESTION OF THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 44/33 OF 4 DECEMBER 1989 (agenda item 9) (continued)

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (A/CONF.152/11, A/CONF.152/12)

1. The PRESIDENT invited the Conference to consider the title and the text of the draft Convention on the Liability of Operators of Transport Terminals in International Trade. Suggested titles were set out in the draft prepared by the United Nations Commission on International Trade Law (UNCITRAL) (A/CONF.152/5) and in a proposal submitted by China (A/CONF.152/L.2). The text of articles 1 to 16, as approved by the First Committee, was reproduced in document A/CONF.152/11 and that of articles 17 to 25, as approved by the Second Committee, was set out in document A/CONF.152/12. A proposal had been submitted by Australia, Germany, Italy and Japan in regard to article 1 (a) (A/CONF.152/L.5). He reminded the Conference that all substantive decisions required to be taken by a two-thirds majority.

Title of the Convention (A/CONF.152/5, A/CONF.152/L.2)

2. Mr. ZHAO Chengbi (China) said that his delegation had explained the thinking behind its proposal (A/CONF.152/L.2) during the discussion in the First Committee of article 1 (c) (A/CONF.152/C.1/SR.2, para. 47). It suggested that the title of the Convention should read "Convention on the Liability of Operators of Transport Terminals in International Carriage of Goods", for two reasons. First, the substantive articles of the Convention should apply not only to goods for trade but to non-trade goods as well. Secondly, although the Convention had to do with international trade, its intention was to achieve a close relationship with, and fill gaps in, existing international instruments on the carriage of goods - in particular the 1978 United Nations Convention on the Carriage of Goods by Sea - which were not confined to international trade.

3. Mr. LAVIÑA (Philippines) said that, unless convincing arguments were put forward against the Chinese proposal, his delegation was prepared to support it. "International carriage" was defined in paragraph (c) of article 1 without reference to international trade, and although it involved international trade, the expression "international carriage of goods" was perhaps more relevant to the Convention.

4. The PRESIDENT invited the Conference to vote on the proposal in document A/CONF.152/L.2.

5. There were 6 votes in favour, 7 against and 18 abstentions. Having failed to obtain the required two-thirds majority, the proposal was not adopted.

6. The PRESIDENT invited the Conference to vote on the title "Convention on the Liability of Operators of Transport Terminals in International Trade" which appeared in the Commission's draft (A/CONF.152/5).

7. The title proposed in document A/CONF.152/5 was adopted by 21 votes to none, with 9 abstentions.

8. The PRESIDENT invited the Conference to consider article by article the texts approved by the First Committee (A/CONF/152/11).

Article 1 (A/CONF.152/L.5)

9. Mr. SMITH (Australia), introducing the proposal by Australia, Germany, Italy and Japan to amend the second sentence of subparagraph (a) (A/CONF.152/L.5), said that it attempted to overcome problems of which the Conference was by now well aware. His own delegation considered it most important to clarify the position under the Convention of stevedores who operated pursuant to a "Himalaya clause" or similar clause in a bill of lading. The intention of the proposal was to make clear the fact that using the carrier's defences and limitations of liability without being subject to the full liability of a carrier could not be employed as a device to escape liability under the Convention. He recalled that stevedores constituted perhaps 90 per cent of operators in the area of activity covered by the Convention. Although it had been argued that not all stevedores would use a "Himalaya" or similar clause solely to attract the carrier's limits of liability, it was worth bearing in mind that not all ports were equally competitive and that stevedores had great bargaining power because they often exercised a monopoly. It was safe to say that, in a number of jurisdictions, if the option of opting out of the regime established by the Convention was available to stevedores it would probably be exercised. Secondly, not all "Himalaya" and similar clauses necessarily confined themselves to offering stevedores the defences and limits of liability of the carrier; in a number of common law jurisdictions they had been held wide enough to exclude stevedores from all liability. In that situation there was no incentive for stevedores to improve their performance. His own understanding had always been that one of the primary aims of the Convention was to provide uniform rules in an area of activity where much damage to goods was occurring - not so much in transit as in handling, loading and storage. He stressed that the proposal would not create the need for double insurance. For example, stevedores at present covered solely by the insurance of the carrier would no longer seek the benefit of "Himalaya" and similar clauses if they were subject to the mandatory rules of the Convention, and consequently they would not need to have their own insurance as well.

10. The PRESIDENT observed that the term "stevedores" did not appear in the Convention. Its use during the Conference had caused some confusion because, as translated into certain languages, it referred to a worker who physically handled goods and not to his employer. For English-speaking people, "stevedore" meant the employer as well as the employee, and from that standpoint a stevedore could be considered the operator of a transport terminal.

11. Mr. LARSEN (United States of America) endorsed the President's interpretation, pointing out that a stevedore was a company that loaded and unloaded vessels. The people who worked for a stevedore were called longshoremen in the United States and dockers in the United Kingdom; the Conference was talking about stevedores that were commercial companies.

12. With regard to the four-nation proposal (A/CONF.152/L.5), he recalled that in 1989 UNCITRAL, in its definition of an operator of a transport terminal, had said that a person would not be considered an operator when he was responsible for goods under applicable rules of law governing carriage (A/44/17, paras. 29-31). In his view, that formulation was the maximum practical unification of law that could be achieved at the Conference. It preserved the operation of the "Himalaya clause" under which a stevedore could choose to be under the regime of the maritime bill of lading or that of the Convention. Under United States law the stevedore could not exculpate himself from liability; that would be contrary to public policy. United States stevedores needed the flexibility offered by the text of article 1 (a)

(Mr. Larsen, United States of America)

reproduced in document A/CONF.152/11. With it, they had use for the Convention; without it they had no use for it. The four-nation proposal led the Conference back into the cul-de-sac in which it had found itself in trying to decide whether to include in the Convention a definition of the term "carrier". That step having proved impossible, the only feasible approach was the one taken in the text approved by the First Committee (A/CONF.152/11), which he appealed to the Conference to accept.

13. Ms. SKOVBY (Denmark) said that in general, if the carrier performed the transport-related service himself or through a servant, his liability, in the sense in which that term was used in the Convention, would fall under the law of carriage of goods; if instead he used an independent contractor - she preferred that term to "stevedore" - it made no difference whether the relevant law of carriage of goods embodied the "Himalaya clause", particularly in the case of sea carriers. If the sea carrier performed the transport-related services himself or through a servant, he could, according to the Hague and Hague-Visby Rules, but not according to the Hamburg Rules, claim exemption from liability during the period before loading and after discharge; and the shipper or receiver would accept that. If the relevant statute or the transport document, for example the bill of lading, had a "Himalaya clause", it would make no difference to the shipper or the receiver if the carrier used an independent contractor. If the shipper or receiver could not accept the disclaimer of liability, he could either say no or take over the transport-related service himself, for example by virtue of a free in-and-out clause, and he could then make an agreement with the terminal operator.

14. As long as the carrier was allowed to disclaim liability the independent contractor could do so when working for him, since in that case he had the same rights and duties as the carrier. It was a political choice not to allow that disclaimer, and it meant that if a person was not satisfied with the provisions of the Hague and Hague-Visby Rules he had to look to the Hamburg Rules.

15. Mr. TUVAYANOND (Thailand) said he found the text of subparagraph (a) of article 1 approved by the First Committee somewhat confusing. In the first sentence, an operator of a transport terminal was defined as a person who took goods in charge, while in the second sentence he was described as a person who was responsible for the goods. The First Committee had decided not to include a definition of the term "carrier" in article 1 because it would present too many problems; properly, therefore, the term should have been deleted from article 11. However, some mention of the carrier in the text of the Convention was unavoidable, and accordingly he supported the four-nation proposal (A/CONF.152/L.5), which would help to dispel any possible misunderstanding.

16. Mr. HERBER (Germany) said it had originally been his delegation's view that the article should not contain a reference to national law or a definition of the term "carrier", on the assumption that all States would be aware of what the term meant. However, that assumption had proved unfounded and the Conference had tried for some time to find an acceptable definition, but without success. The four-nation proposal did not of course require a definition of the term "carrier", but simply made reference to national law, which discussion had shown to be necessary. Its main difference from the text approved by the First Committee was that it was wider in scope and would cover any of a number of situations in which the law of carriage would be applicable.

17. Mr. BERAUDO (France) said that the definition of the term "operator of a transport terminal" was crucial to the scope of application of the Convention, on which so much work had been done over so many years. One of the principal objectives of the Conference was to ensure that all the definitions in article 1 would carry the same interpretation and have the same applicability in law for every State which ratified the Convention. That objective would not be attained if terms were inserted in the article which could give rise to different interpretations under different systems of law. If the phrase "responsible for the goods" was interpreted to mean that responsibility could be extended to cover activities other than transport, a very uncertain situation would be created.

18. The law on maritime transport at present in force derived from the Hague-Visby Rules, which contained a number of provisions imposed by carriers at a time when carriage by sea was uncertain and dangerous. Those rules, still in force in many countries, provided for a liability regime which was very favourable to the carrier but placed heavy burdens on the shipper. It was legitimate for the shipper to wish to ensure that when despatching goods to a country in which clauses such as the "Himalaya clause" were applicable, he should not have to bear the loss if, for example, a container was damaged through faulty handling.

19. In the interests of uniformity, therefore, and with a view to ending practices disproportionately unfavourable to the shipper, the text of article 1 (a) had to be redrafted so as to make clear that the carrier's protection should not be extended to the stevedore in circumstances in which it was not merited. If the text approved by the First Committee was adopted, there was a risk that it would be interpreted by some countries in a way that would destroy the whole content of the Convention. He therefore supported the proposal in document A/CONF.152/L.5.

20. Mr. OCHIAI (Japan) recalled that at the twenty-second session of UNCITRAL the United States delegation had proposed the deletion from article 1 (a) of the reference to a carrier (A/CN.9/SR.403, para. 26). The purpose of that proposal had been to exclude stevedores from the application of the draft Convention when they were already covered by clauses in bills of lading that extended to them the benefit of limits of liability available to carriers under the law of carriage. If that argument was accepted, stevedores could easily avoid liability under the Convention simply by claiming protection under clauses such as the "Himalaya clause". The matter was thus of great significance for the application of the Convention. His delegation had sponsored the proposal in document A/CONF.152/L.5 for that reason.

21. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that whatever the outcome of the four-nation proposal, he wished it to be recorded that the common view which had emerged from the proceedings of the Conference had been that the Convention did in fact apply to stevedores.

22. Miss VAN DER HORST (Netherlands) supported the proposal for the reasons advanced in its favour by other delegations.

23. Mr. SWEENEY (United States of America), in response to the point raised by the representative of Japan, said it was a matter of public policy, not only in the United States but in a number of other common law countries, that stevedores should be unable to exculpate themselves from all liability simply on the basis of contractual clauses. However, he understood that was not the position in countries such as Australia and Japan. The arguments his country had put forward on the subject at the United Nations Conference on the Carriage of Goods by Sea in 1978

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were still valid: stevedores were not carriers, nor agents of the carrier, and should not be regulated as such; rather, they came within the definition of the term "operator". They could obtain some degree of carrier protection, notably in relation to loading and unloading, where most damage to cargo occurred, but such protection had to be bargained for, in exchange for a rate differential, so as to avoid the need for double insurance. He could not support the four-nation proposal and strongly favoured the adoption of the First Committee's text.

24. Mr. SOLIMAN (Egypt) said the First Committee's text for article 1 made sufficiently clear what was to be understood by the word "operator". As he saw it, no amendment to that text was required.

25. The PRESIDENT, summing up the debate, said that the question under discussion was the most important the conference had yet had to deal with and great care should be taken to see that the right conclusion was reached. Two opposing positions had been defined: the first, that of the sponsors of the four-nation proposal (A/CONF.152/L.5), was unacceptable to certain countries, notably the United States, and its acceptance might make it difficult for them to adhere to the Convention. On the other hand, the second position, namely that stevedores were covered by existing clauses in other instruments, could have the effect of destroying the uniformity of the Convention.

26. Mr. BONELL (Italy) took note with the greatest regret of the statement by the United States delegation to the effect that the adoption of the four-nation proposal (A/CONF.152/L.5) might jeopardize the United States Government's acceptance of the Convention. He felt that the wish of the United States was not that stevedores should be able to opt out of the regime established under the Convention, but rather to grant them a choice between that regime and the regime of the Hague-Visby Rules, and possibly of the Humburg Rules. For many other countries, the alternative to liability for stevedores under the Convention would mean no liability for them at all, and it was with those countries in mind that the proposal had been put forward. So far as the matter specially affected the United States, he saw little fundamental difference between the four-nation amendment and the text as it stood. Whatever the outcome of the proposed amendment, he hoped that the fears of the United States delegation would ultimately prove groundless.

27. Mr. INGRAM (United Kingdom) said that he spoke as the representative of a common law country which was also the country where the "Himalaya clause" had originated. He wished to support the four-nation proposal, which in his delegation's view went some way towards enhancing the clarity and uniformity of the draft.

28. Ms. ZAWITOSKI (United States of America) said that under United States law the presence of a "Himalaya clause" in the bill of lading did not automatically mean that stevedores would have the benefit of the carrier's protection under the bill of lading; according to United States court decisions, several stringent requirements had to be met first. The bill of lading had to contain a clause which gave the shipper an opportunity to avoid the package limitation provision of the Hague Rules by declaring a higher value for his cargo and paying an additional amount. Another requirement was that the bill of lading had to include a clause which extended the carrier's responsibility for the goods over the period of time during which the goods were handled by stevedores. If that period was not covered, the stevedore was not protected, despite the presence of a "Himalaya clause" in the

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bill of lading. Her delegation was concerned by the possibility that a serious conflict might arise in the event of the adoption of the proposal because the Convention - which was based on the Hamburg Rules - and the Hague Rules could come into direct and serious opposition with regard to the period of time during which the goods were handled by stevedores.

29. Mr. HERBER (Germany) said that in most countries the situation was different from that just described by the United States representative; if the stevedore was covered by the inclusion of a "Himalaya clause" in the bill of lading, then, under the Hague-Visby Rules, he incurred no binding liability for the period of loading and unloading. In other words, in the majority of countries stevedores were, by way of the "Himalaya clause", included in the exemption from liability granted to carriers. The object of the proposal was to bring stevedores out of that situation and into the Convention.

30. Mr. SMITH (Australia) agreed with the representative of Germany and also associated himself with the observation of the representative of France to the effect that one of the main objects of the Conference was to promote uniformity of law. In practice, stevedores often enjoyed a monopoly position which enabled them to insist on gaining full protection from liability; in his own country, for instance, the vast majority of bills of lading contained a "Himalaya clause". With regard to the possibility of conflict between conventions referred to by the United States representative, the point at issue was the mandatory application of a regime. The only reason why stevedores might be subject to the mandatory provisions of the Hague-Visby Rules would be that they used a clause whereby they contracted into that regime; but if they were subject to the mandatory regime governing operators of transport terminals, they would no longer have an incentive to seek to be covered by the carrier's protection and there would thus be no possibility of conflict.

31. Mr. HORNBY (Canada) concurred with those remarks and also endorsed the point made by the German representative. In his country, too, stevedores could avoid liability by invoking the "Himalaya clause". In the interests of ensuring that the basic intention underlying the Convention was realized, his delegation would agree to the four-nation proposal.

32. The proposal by Australia, Germany, Italy and Japan to amend article 1 (a) (A/CONF.152/L.5) was adopted by 26 votes to 4, with 5 abstentions.

33. Mr. MORAN (Spain) said that the Spanish translation of the amendment just adopted was inaccurate.

34. Mr. BERGSTEN (Executive Secretary) said that the Secretariat had taken note of that. For reasons of consistency, the Conference might wish to align the tense employed in the English version of the amendment with other articles by changing the words "shall not be" to "is not".

35. It was so agreed.

36. Article 1, as amended by the proposal in document A/CONF.152/L.5, was adopted by 27 votes to 2, with 3 abstentions.

Article 2

37. Article 2 was adopted by 30 votes to none, with 3 abstentions.

Article 3

38. Article 3 was adopted by 29 votes to 2, with 2 abstentions.

39. Mr. INGRAM (United Kingdom), speaking in explanation of vote, said that his delegation had voted against the article because it was insufficiently clear about the period for which the operator was responsible for the goods.

Article 4

40. Article 4 was adopted by 29 votes to 1, with 4 abstentions.

41. Mr. LAVIÑA (Philippines), speaking in explanation of vote, said that his delegation had abstained because the wording of article 4, especially in paragraphs 1 and 2, was unclear.

Article 5

42. Article 5 was adopted by 30 votes to 2, with 2 abstentions.

Article 6

43. Article 6 was adopted by 23 votes to 3, with 8 abstentions.

44. Mr. RUSTAND (Sweden), speaking in explanation of vote, said that his delegation had abstained because it favoured the Convention specifying higher limits of liability in order to take account of the effects of inflation. The United States delegation had mentioned that during the discussion of article 6 in the First Committee (A/CONF.152/C.1/SR.8, para. 64).

45. Mr. LAVIÑA (Philippines), speaking in explanation of vote, said that his delegation had abstained because it regretted the failure of the Convention to provide, as proposed by the German delegation in document A/CONF.152/C.1/L.12, that units of account per package as well as per kilogram of weight should be a basis for reckoning liability limits. If the Convention had done that, it would have taken account of shipments of low weight but high value, like other conventions.

46. Mr. LARSEN (United States of America), speaking in explanation of vote said that his delegation had voted in favour of the article subject to its interpretation that the terminal operator might not unilaterally, by contract, agree to raise the limits of liability for servants, agents and other persons whose services were used by the operator.

47. Mr. SCHROCK (Germany), speaking in explanation of vote, said that his delegation had abstained for the reasons given by the delegations of Sweden and the Philippines.

48. Mr. INGRAM (United Kingdom), speaking in explanation of vote, said that his delegation had voted against the article because it failed to contain an overall or global limit of liability. His delegation had explained to the First Committee (A/CONF.152/C.1/SR.10, paras. 25-26) the serious implications which that entailed for an operator in obtaining insurance and for insurers generally. The adoption of a convention which made risks less insurable than before would do a disservice to international trade, rather than the contrary. Moreover, without an overall limit of liability, the Convention would be less attractive to many States because their terminal operators would be subject to such high liabilities that it would cease to be useful and would be unlikely to come into effect.

49. Mr. HORNBY (Canada), speaking in explanation of vote, said that his delegation had abstained because of the absence of provision for a global limit of liability and a limit of liability per package. That would expose the operator to unwarranted risks and liability.

Article 7

50. Article 7 was adopted by 34 votes to none.

Article 8

51. Article 8 was adopted by 23 votes to 7, with 3 abstentions.

52. Mr. RUSTAND (Sweden) said that his delegation considered the article very important. It would have preferred the wording which would have resulted from acceptance either of the Netherlands proposal (A/CONF.152/C.1/L.25) or the second option suggested by Germany (A/CONF.152/C.1/L.3, second para.). It was not satisfied with the way in which the Convention allowed the effects of acts or omissions by servants or agents to circumscribe the operator's right to limit his liability.

53. Mr. INGRAM (United Kingdom) said that similar reasons had prompted his delegation to vote against the article. The possibility of an operator's limits being broken because of the intentional or reckless acts of his servants or agents would make his liability almost uninsurable, or insurable only at a very high cost, which was to no one's advantage.

54. Mr. HORNBY (Canada) associated himself with the comments of the previous two speakers.

55. Mr. LAVIÑA (Philippines) said that his delegation had abstained from the vote because the discussion of the article had not allayed its doubts, especially about the association between recklessness and knowledge.

56. Mr. SCHROCK (Germany), Miss VAN DER HORST (Netherlands) and Mr. CHRISTOV (Bulgaria) said they had voted against the article for the same reasons as Sweden, the United Kingdom and Canada.

The meeting rose at 12.45 p.m.